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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 408

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER AND RUCKLER PENN, AS A PROTECTIVE COMMITTEE FOR THE HOLDERS OF PREFERRED STOCK OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 406.

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER AND RUCKLER PENN, AS A PROTECTIVE COMMITTEE FOR THE HOLDERS OF PREFERRED STOCK OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners seek to review an order (R. 122) of the United States Circuit Court of Appeals for the Seventh Circuit, entered May 17, 1946, dismissing an appeal from an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on January 3, 1946, (R. 98) in the Reorganization Proceedings, under Section 77 of the Bankruptcy Act, of Chicago, Milwaukee,

St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals sought to be reviewed is reported at 155 Fed. (2nd) 489.

The order of the District Court from which the original appeal was taken was one denying the motion (R. 55) of Petitioners to modify the so-called Consummation Order (R. 7), entered November 26, 1945, which, among other things, vested the Debtor's property in the Reorganized Company. The motion did not raise objection to anything contained in the order of November 26, 1945, but sought to modify it by adding a paragraph numbered 49 reading as follows:—

> "(49) The Court further reserves jurisdiction over the property vested in the Reorganized Company by this order, over the Reorganized Company, over the Trustees, and over all other parties to this proceeding, for the purpose of entering an appropriate order, upon application being made by any party in interest, to apply to the Debtor and its property the provisions of any legislation hereafter becoming law which by its terms would have affected the Debtor had not this order been entered."

At the hearing on the motion Counsel for Petitioners stated that they would limit their motion to a request for the retention of jurisdiction only until the termination of the Seventy-ninth Congress of the United States. (R. 67.) To the motion was attached a copy of the so-called Reed Bill, H. R. 4779, introduced November 23, 1945, which provided that if the properties of a railroad corporation in a reorganization proceeding pending under Section 77 should have produced average annual earnings during the period of the preceding seven calendar years sufficient to pay the fixed charges of said Debtor in said years and the judge should so find, he should direct the Trustees to return the properties to the corporation and allow a period of eighteen

months within which to negotiate with creditors for reorganization of the property and, if such negotiations were not successful within the time provided, the 77 proceeding should be resumed.

Petitioners constitute a Protective Committee for the holders of the old preferred stock of Chicago, Milwaukee, St. Paul and Pacific Railroad Company prior to its reorganization, which stock was found to be of no value by the Interstate Commerce Commission, the District Court having jurisdiction of the Bankruptcy Proceedings and the Circuit Court of Appeals for the Seventh Circuit. Such finding was approved by this Court in—

> *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 318 U. S. 523, 541.

A comprehensive chronology of the Milwaukee Proceedings is set forth in a footnote to the decision of the Circuit Court of Appeals in 155 Fed. (2nd) 489. We shall, therefore, refer here only to certain of the more important steps taken in said proceedings.

The first plan of reorganization was set forth in an order of the Interstate Commerce Commission of February 12, 1940 (239 I. C. C. 485). That plan was approved by the District Court on October 21, 1940, the Court's decision being reported at 36 Fed. Supp. 193. On appeal that plan was approved in part and reversed in part by the Circuit Court of Appeals of the Seventh Circuit on December 4, 1941, the decision appearing at 124 Fed. (2nd) 754. This Court granted certiorari to review the judgment of the Circuit Court of Appeals and on March 15, 1943, rendered its decision reported at 318 U. S. 523, in which it approved the plan except as to two points, one involving the priority of liens on certain pieces of lines and the other involving the question of additional compensation to senior bondholders, neither of which questions is material here.

The proceeding went back to the Interstate Commerce Commission which, after a hearing, on December 6, 1943, promulgated a modified plan which was further modified by its order of April 10, 1944, reported at 254 I. C. C. 707, and 257 I. C. C. 223. At the hearing before the Commission the earnings of the Company from the date of the original plan up to and including the year 1943, which was the peak year of the carrier so far as net railway operating income was concerned, were introduced in evidence and appear in Exhibits 224 and 231 before the Commission which exhibits constitute a portion of the unprinted record. This plan, with certain clarifications and corrections made pursuant to Section 77, was approved by the District Court on June 30, 1944, 58 Fed. Supp. 384. The plan so approved was the final plan. Appeals from the order approving the plan were dismissed by the Circuit Court of Appeals of the Seventh Circuit on October 31, 1944 (145 Fed. (2nd) 299) and certiorari was denied by this Court (324 U. S. 857—Rehearing denied 325 U. S. 895).

This plan was submitted to and accepted by the requisite percentage of creditors to whom submission was necessary. In both plans the Commission found and the Courts approved the finding that the stock of the Debtor, both preferred and common, was of no value and the old stockholders, therefore, were not given any participation under the plan. After approval by the creditors, the Court, after hearing pursuant to notice given, entered an order confirming the plan on February 23, 1945. (R. 1.) From that order no appeal was taken. A Reorganization Committee to carry out the plan, whose members were nominated as provided in the plan, was approved by the District Court by order dated March 13, 1945, and proceeded with its work.

The plan provided for the payment of cash to certain bondholders in excess of $52,000,000. This payment was

made beginning June 1, 1945, pursuant to an order of Court of May 22, 1945. Thereafter, the Interstate Commerce Commission approved the acquisition of the Debtor's property by the Reorganized Company, approved the use for reorganization purposes of the old corporation with certain amendments to its charter as set out in the Charter Amendments Order, which is by stipulation a part of this record, and approved the issuance of the new securities. (C. M. St. P. & P. R. R. Co. Reorganization, Finance Docket No. 10882, Order dated November 15, 1945.)

On November 26, 1945, after notice to all parties, including the Petitioners, and following hearing, the District Court entered the Consummation Order (R. 7) which was in effect a final order vesting the property of the Debtor in the Reorganized Company, approving various instruments necessary to consummate the reorganization and directing the consummation. No appeal was taken from that order. The date of the vesting of the property of the Debtor in the Reorganized Company, as fixed in said order, was December 1, 1945.

No objection was made to the Consummation Order or to the Charter Amendment Order, entered on the same date, which approved the charter amendments and directed that they be filed with the Secretary of State of the State of Wisconsin, the State of incorporation. Paragraph (14) of the Consummation Order (R. 31) provides that the shares of stock of all classes and the certificates representing all such shares of stock of the Debtor are "declared to be void and of no effect and are cancelled for all purposes whatsoever." The order also directed that the transfer to the Reorganized Company should be free of all claims of the stockholders of the Debtor as provided in the confirmed plan of reorganization. The Charter Amendment Order provided that all shares of the old stock were cancelled and

nullified, the equities of the holders thereof having been found to be of no value, and that the new stocks should be issued according to the plan. The Consummation Order directed that the old mortgages be released of record, the new mortgages executed and delivered and placed of record and that the new securities issued by the Reorganized Company be irrevocably delivered to the Exchange Agent for transmittal to those entitled thereto under the confirmed plan of reorganization. All of these directions were carried out. The property of the Debtor was transferred to the Reorganized Company on December 1, 1945, and certified copies of the Consummation Order, pursuant to Section 77 (k), the Trustees' Deed, the releases of the old mortgages and the new mortgages were recorded in two hundred and thirteen places in the fourteen States in which the Company operates. Irrevocable delivery of the new securities to the Exchange Agent was made and said Agent began delivery to those entitled under the plan early in December. The new securities were listed for trading both in New York and in Chicago and it is a matter of common knowledge that there has been heavy trading continuously ever since. Testimony as to the action taken in consummation of the plan appears in the printed record, pages 81 to 88, inclusive.

At the hearing upon the motion, on January 3, 1946, the Petitioners relied upon the recital in the motion that average earnings of the Debtor from 1938 to 1944, inclusive, were in excess of the average fixed charges and the further recital of an increase in the assets of the Debtor between December 31, 1937, and January 1, 1944, and the change in economic conditions generally, and urged that the assets of the Company were sufficient to provide an equity for the old preferred stockholders though they conceded that there was $85,000,000 of debt ahead of the stock which was not compensated under the plan. They insisted that they were not seeking any change in the plan and, upon being

questioned by the Court, stated that they did not contend that they had any rights under the present law; that their rights had been wiped out and that they could not say to the Court that he should change the plan. (R. 62, 66, 67, 91.)

The Trustees and the Reorganization Committee introduced evidence showing the financial condition of the Debtor on different dates, including December 31, 1943, the effective date of the plan being January 1, 1944. This financial information is contained in Exhibits 1 and 2, found at pages 97 and 98 of the printed record. Exhibit 2 shows that the assets of the Company, as of October 31, 1945, were less than on December 31, 1943. Exhibit 1 shows that on December 31, 1943, there was unpaid interest on bonds other than Adjustment Bonds of $77,864,098, Funded Debt matured and unpaid amounting to $17,390,463, and Adjustment Bond interest unpaid amounting to $125,268,480, which Adjustment interest had increased, on October 31, 1945, as shown by Exhibit 2, to $142,031,902. All of the above items were ahead of preferred stockholders. (See 318 U. S. 523, at 530 and 573.)

Exhibit 2 also shows that the items of cash and temporary cash investments, as of December 31, 1943, amounted to $120,113,614, which items, on October 31, 1945, amounted to the reduced total of $92,577,063.

At the hearing it was pointed out by the Vice President and Comptroller of the Company that the claim of the Adjustment Bondholders, in the aggregate amount of $77,721,320 (R. 73) received no compensation whatsoever under the plan, and that the remainder of the claim, amounting to $230,420,853 (R. 74) was compensated in common stock which, at the market on the day the stock was made available for distribution, was worth only $64,440,058, so that the distribution to these bondholders, who were secured

creditors, fell short by $243,702,115 of making full compensation to them. In addition, general unsecured creditors were only fractionally compensated. (R. 75.)

The Circuit Court of Appeals dismissed the appeal, upon the grounds that the order appealed from was not appealable and also because it appeared from the facts discussed in the opinion that no other conclusion could be justified than the one reached by the District Court and that no abuse of discretion could be ascribed to the Court, which reasons were set forth in the motions to dismiss as characterizing the appeal as frivolous.

Petitioners point out that the so-called Wheeler-Reed Bill, S. 1253, embodies certain provisions of the Reed Bill, referred to in Petitioners' original motion, and certain provisions of the original Senate Bill, S. 1253, introduced by Senator Wheeler on July 12, 1945, and later amended to affect reorganization railroads. This Wheeler-Reed Bill was embodied in a Conference Report which was adopted by both Houses but the President declined to approve the legislation so that it did not become law. The Seventy-ninth Congress has adjourned *sine die*. In substance, Petitioners' request is that this Court should require the District Court to amend the Consummation Order retroactively in the hope that a Special Session may be held in 1946 which might enact legislation which they contend would apply but which we are convinced could not apply to these proceedings.

Final Decree in the Bankruptcy Proceedings was entered on June 18, 1946, and a copy thereof is attached, as an appendix, to the brief filed herein on behalf of the Reorganization Committee.

SUMMARY OF ARGUMENT.

I. The Order of the District Court refusing to modify the Consummation Order was not appealable.

Triangle Electric Co. v. *Foutch*, 40 Fed. (2nd) 353.

Re Pechin, 227 Fed. 853.

In re Witthoft, 98 Fed. (2nd) 972.

In re Gelino's, Inc., 51 Fed. (2nd) 875.

Pfister v. *Northern Illinois Finance Corp.*, 317 U. S. 144.

Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131.

Old Colony Trust Co. v. *Kurn*, 138 Fed. (2nd) 394.

Ross v. *Commissioner of Internal Revenue*, 316 U. S. 685.

Wisconsin v. *Illinois*, 281 U. S. 179, 197-8.

In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 145 Fed. (2nd) 299.

Sancho v. *Acevedo*, 93 Fed. (2nd) 331; (C. C. A. 1) Certiorari denied 303 U. S. 662.

Pearson v. *Higgins*, 34 Fed. (2nd) 27.

II. The Order of Confirmation, entered February 23, 1945, was a final adjudication of the rights of the stockholders. No appeal was taken therefrom and thereafter the stockholders had no interest in the proceeding.

Sub. (f) of Section 77, Bankruptcy Act; Title 11, Sec. 205, U.S.C.A.

Chicago & North Western Railway Company v. *United States*, 52 Fed. Supp. 65, affirmed 320 U. S. 718.

6 Am. Juris, para. 593, p. 867.

In re Chicago & North Western Railway Company, 121 Fed. (2nd) 791.

In re Michigan Ohio Building Corp., 117 Fed. (2nd) 191.

Missouri Pacific R. Co. v. *Thompson*, 134 Fed. (2nd) 139, 141; (C. C. A. 8) Certiorari denied 320 U. S. 806.

United States v. *Peerless Weighing & Vending Machine Corporation*, 96 Fed. (2nd) 996; 97 Fed. (2nd) 1019; (C. C. A. 2) Certiorari denied 305 U. S. 633.

III. The Court could not, by reservation of jurisdiction, change the confirmed plan.

In re Corona Radio & Television Corporation, 102 Fed. (2nd) 959.

In re Diversey Building Corporation, 141 Fed. (2nd) 65.

In re Flatbush Av.-Nevins St. Corp., 133 Fed. (2nd) 761.

North American Car Corp. v. *Peerless Weighing & Vending Machine Corporation*, 143 Fed. (2nd) 938, 941.

Towers Hotel Corp. v. *LaFayette National Bank, etc.*, 148 Fed. (2nd) 145.

IV. After confirmation and consummation, rights became vested which could not be disturbed by Congressional action and the Court was right in refusing to attempt to give retroactive effect to hoped-for legislation.

Cooley, Constitutional Limitations, 8th Edition, Vol. 1, pages 190, 191, 192.

McCullough v. *Virginia*, 172 U. S. 102.

Steamship Company v. *Joliffe*, 2 Wallace 450, 457.

Pritchard v. *Norton*, 106 U. S. 124.

Hoyt Metal Co. v. *Atwood*, 289 Fed. 453.

Coombes v. *Getz*, 285 U. S. 434.

Ocoha v. *Hernandez*, 230 U. S. 139.

Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1.

In re Corona Radio & Television Corp., 102 Fed. (2nd) 959 (C. C. A. 7—1939).

In re Wedgewood Hotel Company, 125 Fed. (2nd) 327 (C. C. A. 7—1942).

V. There is no equity in the position of Petitioners.

Group of Institutional Investors v. *CMStP&PRR Co.*, 318 U. S. 523.

Reconstruction Finance Corporation v. *D&RGW RRCo.*, 150 Fed. (2nd) 28. Reversed 90 L. Ed. 1134.

ARGUMENT.

I.

The Order of the District Court Refusing to Modify the Consummation Order Was Not Appealable.

We agree that the appeal section of the Bankruptcy Act is applicable in 77 proceedings and, while this section (24) permits appeals in proceedings in bankruptcy, either interlocutory or final, the construction of the section, both before and after the most recent amendments in 1938, requires that orders in bankruptcy, to be appealable, must have a certain degree of finality. The reason for the rule was stated in—

Triangle Electric Co. v. *Foutch*, 40 Fed. (2nd) 353.

The Court in that case quoted with approval from the earlier case of *Re Pechin*, 227 Fed. 853, the following:

> "There must be a certain degree of finality about these administrative orders before they can be reviewed; if every order were reviewable, proceedings could easily be so tied up and prolonged that the situation would become intolerable. * * *"

The same rule was applied by the Circuit Court of Appeals of the Seventh Circuit in—

In re Whitthoft, 98 Fed. (2nd) 972,

and in the earlier case of—

In re Gelino's, Inc., 51 Fed. (2nd) 875.

The rule has been most frequently applied to orders denying rehearings. A leading case decided by this Court is—

Pfister v. *Northern Illinois Finance Corp.*, 317 U. S. 144,

in which the Court has this to say with reference to the refusal to modify a prior order:

> "A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. An appeal does not lie from the denial of a petition for rehearing. *Conboy* v. *First National Bank*, 203 U. S. 141, 145; *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Brockett* v. *Brockett*, 2 How. 238; *Roemer* v. *Bernheim*, 132 U. S. 103; *Jones* v. *Thompson*, 128 Fed. (2nd) 888; *Missouri* v. *Todd*, 122 Fed. (2nd) 804."

One of the best known cases upon the general subject is—

Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131.

The specific question of the appealability of an order refusing to modify a prior order or decree has been decided in a case arising under Section 77 of the Bankruptcy Act.

Old Colony Trust Co. v. *Kurn*, 138 Fed. (2nd) 394 (C. C. A. 8—1943).

In that case the Court made an order on October 14, 1942, directing the Trustees of the Debtor Railway Company to pay over an amount represented by certain bonds with interest at the rate of 5%. Thereafter a motion was made to modify the order by changing the interest rate to 6%. The motion was denied by order of December 8, 1942, from which latter order the appeal was taken. No appeal was taken from the order of October 14, 1942. The Court dismissed the appeal saying, at page 395:

> "The appellee challenges the jurisdiction of this court to entertain this appeal on the ground that it was not taken from an appealable order. This challenge, we think, must be sustained. 'Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to

errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable.' *Jones* v. *Thompson, et al.*, 8 Cir., 128 F. 2d 888, 889; *United States* v. *East*, 8 Cir., 80 F. 2d 134, 135; *United States* v. *Dowell*, 8 Cir., 82 F. 2d 3, 4; *Missouri* v. *Todd*, 8 Cir., 122 F. 2nd, 804; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., et al.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed., 557; *Pfister* v. *Northern Illinois Finance Corporation*, 317 U. S. 144, 149, 63 S. Ct. 133, 87 L. Ed. 146. *A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion.* (Italics ours.)

The appellant seeks to sustain its right of appeal by the contention that the order of October 14, 1942, because of the court's reservation of jurisdiction was not a final order and hence not appealable. The question of the finality of the order of October 14, 1942, is of no importance to decision here, since no appeal lies from the denial of a motion to modify a non-appealable order. *Republic Supply Co. of California* v. *Richfield Oil Co. of California*, 9 Cir., 74 F. 2d 909, 910. Moreover, if by this argument appellant means to say that the order of October 14, 1942, only became final upon the denial of the motion to modify, appellant has nevertheless failed to appeal from the order after it became final; and, whether the time for appeal began to run on October 14, 1942, the date of the original entry of the order, or on December 18, 1942, the date of the denial of the motion to modify, the time for appeal has expired. 11 U.S.C.A. Para. 48.

The appeal is dismissed for want of jurisdiction."

The *Kurn case* is on all fours with this case and there is sound reason supporting the rule announced. If a party were permitted to make a motion to modify an order in some one particular and then to take an appeal from

the order denying the modification, such motions could be repeated from day to day, each referring to some different particular in which modification might be desired and by that process appeals could be multiplied and the proceeding indefinitely prolonged, whereas, in fact, what the moving party is attacking all along is the order which he seeks to modify. If that order contains something which the party thinks it should not contain or does not contain something which he thinks it should contain, as was the case here, then his objection in either case goes to the order which represents in final form the Court's action. In this case such final order was the Consummation Order entered on November 26, 1945. By appeal from such order, assuming the proper foundation were laid, the appealing party could review all of the alleged defects upon which he relies. In this case no appeal was taken from that order, either before or after the denial of the motion to modify, and the time to appeal has long since expired. That order was entered pursuant to notice which definitely stated that it was proposed to vest the property of the Debtor and of the Trustees in the Reorganized Company. These Petitioners, though having such notice, did not object to the order as entered and as to them the same has become final.

Petitioners argue that the decision that this order was not appealable is in conflict with the decision in—

U. S. v. *Trogler*, 237 Fed. 181,

decided by the Circuit Court of Appeals of the Eighth Circuit in 1916. The distinction between the cases is apparent at a glance. In the *Trogler case*, as pointed out in the opinion, the Court was asked to give effect to an agreement made between the parties to a decree subsequent to its entry, which agreement was in the form of a stipulation for the entry of a supplemental decree in conformity with its terms. The District Court refused to

enter the decree asked for by the parties and the Circuit Court of Appeals, in reversing the case, said, at page 184:—

> "We think the trial court was wrong. It was not asked to modify the former decree upon a re-examination of the issues that were involved in the suit in which the decree was entered. Its action was invoked to give effect to an agreement made between the parties to the decree subsequent to its entry. Clearly parties are at liberty to enter into agreements in respect to their rights under judgments of courts, the same as in regard to any other property right. And if the aid of the court is necessary in order to carry out their agreement, we see no reason why a court should not give them such relief."

The case of—

United States v. *Rizzo,* 297 U. S. 530,

likewise relied upon by the Petitioners, is equally inapplicable. In that case, while the petition of the United States for rehearing, after an adverse decree denying its complaint for forfeiture of a vessel engaged in carrying alcohol, allegedly in violation of the Custom Laws, was pending, the Court permitted the sale of the alcohol and the United States then filed a petition asking that the proceeds be paid into the Treasury in satisfaction of the lien for taxes due on the alcohol. This Court quite properly held that the rights sought to be enforced by the United States had not theretofore been litigated and that the order denying the Government's petition was appealable.

Petitioners try to avoid the *Kurn case* by stating that it was in fact a denial of a petition for rehearing, a contention which is clearly negatived by the decision which makes it clear that the matter involved was a motion to modify a prior order.

There is no merit to the contention that the proposed

new legislation constituted new matter and presented a new issue not involved at the time the Consummation Order was entered. Legislation certainly is not effective until it is enacted, and, as we understand it, the Courts apply the law as it is at the time they are called upon to act. The introduction of a Bill constituted no valid ground for interfering with this and other reorganization proceedings. If the Bill had in fact been enacted, then the question of its application to this proceeding would require a consideration of the provisions of the legislation and the status of the proceedings at the time of its enactment. The Court was not called upon to make a guess as to the probable outcome of the proposed legislation and if it could it was not called upon to suspend or delay the proceedings in anticipation of what might or might not happen. As a matter of fact, the proposed legislation in this case never became a law and Congress has adjourned.

This Court has rejected attempts to hold up the conclusion of litigation until after Congressional action on proposed legislation. In—

Ross v. *Commissioner of Internal Revenue,* 316 U. S. 685,

a petition for certiorari was filed in this Court to review a decision of the Circuit Court of Appeals for the Third Circuit, reported in 125 Fed. (2nd) 767. The petitioner also filed a motion to defer consideration of the petition pending action upon said proposed legislation. The Solicitor General opposed the motion stating that it was entirely conjectural as to whether or in what form Congress would enact any such legislation and whether it would in any event be applicable to the case. This Court denied the motion to defer consideration and likewise denied the petition for certiorari. (316 U. S. 685.)

The only case relied upon by Petitioners to justify the

retention of jurisdiction in anticipation of Congressional action is—

Wisconsin v. *Illinois,* 281 U. S. 179, 197-8,

but the case does not support their position. In fact it is an authority directly against them. The case involved the withdrawal of water from Lake Michigan and by a prior decree the restoration of rights adjudged to the complainants was made gradual and the case referred to a Master to consider the appropriate measures. The situation was a continuing one and naturally subject to Congressional action. With reference to that subject the Court says:—

> "These requirements as between the parties are the constitutional right of those States, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. In present conditions there is no invasion of it by the former decision of this Court, as urged by the defendants. The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter. See *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232, 233. *Kansas* v. *Colorado,* 206 U. S. 46, 117."

Before leaving this point we cannot refrain from referring to the statement of the Petitioners that the introduction of the proposed legislation was unknown to them and to the Court at the time the Consummation Order of November 26, 1945, was entered. The fact is that the introduction of the Bill by Congressman Reed was widely publicized in the papers of November 23rd and 24th and prior to that time wide publicity was likewise given in the Chicago papers to the effect that Congressman Reed, of Illinois, had requested the Court to postpone action in the Milwaukee proceeding and the Court, at the time he directed

entry of the order of November 26, 1945, stated from the Bench that he had heard from members of Congress and others urging that the proceedings be not closed and that the properties be placed back in the hands of the stockholders. Under the circumstances, if Petitioners were in ignorance of what was going on, they evidently were the only ones interested in this reorganization who were in that condition.

Moreover, they certainly knew of the efforts which were being made in Congress over a long period to amend Section 77 of the Bankruptcy Act for the purpose of preserving stockholder interest in reorganizations. The Hobbs Bill, H. R. 4960, was introduced in 1944 in the Seventy-eighth Congress and a similar Bill with the same general objective, H. R. 37, was introduced in January, 1945, and passed the House on February 14, 1945, which was prior to the date of confirmation of the plan in the Milwaukee case. It was referred to the Senate Committee on Interstate Commerce and remained there throughout the time that this plan was being consummated. The fact is that the pendency of legislation of this character was brought to the Court's attention in the petition for certiorari to review an appeal from an order dismissing the appeals from the approval of the plan of reorganization, *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 145 Fed. (2nd) 299, which petition for certiorari was denied by this Court (324 U. S. 857) rehearing denied (325 U. S. 895).

Petitioners urge that alleged lack of merit of the appeal was no ground for its dismissal. We have pointed out above that the Court based its decision upon the points that the order appealed from was not appealable, that there was no abuse of discretion and that the appeal under the facts was frivolous. The order was not appealable under the doctrine of the *Kurn case, supra;* if discretionary, it

A three-judge court, in the case of—

Chicago & North Western Railway Company v. *United States*, 52 Fed. Supp. 65, affirmed 320 U. S. 718,

in construing the sub-division just quoted, says:—

"After an order of the Commission has been approved by the bankruptcy court, submitted to vote of creditors and subsequently confirmed by the district court sitting as a court of bankruptcy, the order is no longer merely an order of the Commission, but has the character of a valid, judicial decree of the bankruptcy court. Section 77, sub. f, 11 U. S. C. A. Sec. 205 sub. f, which states that the provisions of the plan and of the order of confirmation shall be binding 'subject to the right of judicial review,' clearly intends that the 'judicial review' shall be by the circuit court of appeals and thence to the Supreme Court, not to a three-judge district court. The prescribed procedure was followed in this case, and now, having failed in its attempts to win judicial support for its contentions in the designated forums, plaintiff seeks reconsideration of its arguments by a still further procedure which is not open to it."

See 6 Am. Juris., Para. 593, p. 867.

These statutory provisions under Section 77 are somewhat different from those under 77B and its successor, Chapter X of the Bankruptcy Act. In 77B and Chapter X proceedings the Court has power to modify a plan of reorganization after its confirmation (11 U.S.C.A. 207 (f); Chapter X, Sec. 222; 11 U.S.C.A. 622) and the final decree specifically terminates the interests of the stockholders. (Sec. 228; 11 U.S.C.A. 628.) In Section 77 proceedings, on the other hand, the Court has no power to modify a plan of reorganization after its confirmation and express provision is made for review of the order of confirmation, after which the plan is final and binding upon all parties.

Even in 77B and Chapter X proceedings, the modification which would have been required to give participation to stockholders would not have been proper in spite of these statutory differences.

In re Diversey Building Corporation, 141 Fed. (2nd) 65.

The order confirmed a plan which by its terms excluded all stockholders of the debtor from any participation. This exclusion had been approved by the District Court, the Circuit Court of Appeals and by this Court and the denial of stockholders of any rights was, therefore, finally determined when the plan was confirmed. The only way that holders of old preferred stock could ever obtain any participation in the assets of the debtor would be by setting aside or changing the plan of reorganization since the plan disposes of all of the assets of the debtor and under those circumstances the old preferred stockholders could not obtain anything except what was taken away from someone else.

Since the plan, after confirmation without appeal, became final, the stockholders from that time forward had no interest whatever in the estate and no right to participate further in these proceedings. The Circuit Court of Appeals, in—

In re Chicago & North Western Railway Company, 121 Fed. (2nd) 791.

considered this question and in the course of its opinion said:—

> "A court should hesitate before denying to the parties whose rights are thus cut off, the right to review its order by appeal. On the other hand, the court must give heed to the fact, that where the debtor's property is insufficient to pay the debts and obligations of the debtor, the stockholder *has no interest* in the debtor's

estate. His interest is nil. He is as much a stranger as if he had never held the stock." (p. 799; italics in the original.)

The same conclusion was reached in a case arising in a 77B proceeding, the decision being by the same court, in—

In re Michigan Ohio Building Corp., 117 Fed. (2nd) 191.

See to the same effect—

Missouri Pacific R. Co. v. *Thompson*, 134 Fed. (2nd) 139, 141; (C. C. A. 8) Certiorari denied 320 U. S. 806;

United States v. *Peerless Weighing & Vending Machine Corporation*, 96 Fed. (2nd) 996; 97 Fed. (2nd) 1019; (C. C. A. 2) certiorari denied 305 U. S. 633.

It would seem, therefore, that after the confirmation of the plan and expiration of time to appeal, the stockholders of the debtor ceased to have any property interest which could be restored, either by judicial decree or by a legislative act. In this case the proceedings went further and were in fact consummated even before the motion of the Petitioners was made and certainly as a result vested rights were created which could not later be disturbed. This latter question will be more fully developed in a later point.

III.

The Court Could Not, by Reservation of Jurisdiction, Change the Confirmed Plan.

We have previously pointed out that in order to grant preferred stockholders any participation it was necessary to change or amend at some time the plan of reorganization. This is obvious and is not denied by Counsel for

Petitioners. The Wheeler-Reed Bill provided specifically for the amendment of plans to provide for excluded classes in the case of carriers to which the Act applied. We have likewise shown under the preceding point that the decree of confirmation is a final judgment which definitely fixes the plan of reorganization. As heretofore stated, Section 77 contains no provision for changing a plan after it is confirmed or for any supplemental or amended plan after the order of confirmation. True, the plan is thereafter subject to timely judicial review, but there was no such judicial review in this case.

It is submitted that the Court could not, by means of reservation of jurisdiction in the order of confirmation, and certainly not by a similar reservation in the order of consummation, make possible any subsequent change in the plan. Our view upon this point is supported by the following decisions:—

In re Corona Radio & Television Corporation, 102 Fed. (2nd) 959;

In re Diversey Building Corporation, 141 Fed. (2nd) 65;

In re Flatbush Av.-Nevins St. Corp., 133 Fed. (2nd) 761;

North American Car Corp. v. *Peerless Weighing & Vending Machine Corporation,* 143 Fed. (2nd) 938, at p. 941;

Towers Hotel Corp. v. *LaFayette National Bank, etc.,* 148 Fed. (2nd) 145.

These cases arose in 77B and Chapter X proceedings where the applicable statutes, as pointed out under II above, gave the court power to modify a plan after confirmation, (11 U.S.C.A. 207 (f); Sec. 222, Chap. X, 11 U.S.C.A. 622) whereas no such power is given by Section 77.

In the *Diversey* case the Court said:

> "We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the court."

In the *Corona case* the Court, in discussing the effect of reservation of jurisdiction, said:—

> "As heretofore stated, we do not think there was any reservation in the plan by which jurisdiction was retained, and we are also of the opinion that no general reservation contained in a plan could be utilized by the court so as to confer jurisdiction, after a final decree of a matter inconsistent with the plan itself. To so hold would be the equivalent of altering the plan and the contract included therein, without the consent or approval of the debtor, creditors, or parties to the contract."

In the *Flatbush case* we find this language:

> "Congress did not intend that the Bankruptcy Court should, after an approval of a plan under Chapter X, Bankr. Act, 11 U. S. C. A. Sec. 501 *et seq.*, have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction."

In the *Peerless case* we find the following:—

> "Nor is it an answer to such delay, to the prejudice of other parties in interest, to say that they should have taken steps to procure a final closing order from the court. True, there seems no reason why such order should not have been entered long before; but, after all, that tends to be only a formality and to be so considered by the parties, as was obviously the case here. It is the confirmation and consummation of the plan

which is the culminating point of the entire proceedings; and it is unnatural, as well as inequitable, to deny finality to a fully consummated plan until the court chooses to write 'finis' in some formal legal language for the clerk to copy into the court records. Indeed, there seems considerable point in appellants' claim that the order below was a substantial modification of the plan by changing the time limit for exchange after it had already passed, and hence was improper for lack of the notice required by sub. f quoted above."

We also call attention to the following statement by the Court in the *Towers Hotel case:*

> "Judge Galston's interpretation of the powers reserved in his decree seems reasonable both under the rule of *ejusdem generis* and under the reasoning of our recent decisions in which we held that in confirming a plan of reorganization the court may only retain jurisdiction in order to protect its decree, to prevent interference with the execution of the plan and to aid otherwise in its operation, and may not, through the device of retaining jurisdiction, keep a debtor in tutelage and burden the court with future supervision of the reorganized estate." Citing cases.

If the Court could not, pursuant to reservation of jurisdiction in the Confirmation Order, change the plan, it necessarily follows that a similar reservation in the Consummation Order would be ineffective since the Consummation Order after all is an order designed to execute the provisions of the confirmed plan and carry it out in accordance with its terms.

We note that Petitioners argue that the recent action taken by Judge Igoe in the Rock Island case is inconsistent with and contrary to his action in the Milwaukee proceeding. We do not follow this argument. In the first place, the mere fact that the same judge presided in both cases and that the dates of the two rulings were reasonably close together would of itself, we think, indicate quite

clearly that in the opinion of the judge rendering the decision there was no inconsistency as indeed there was not. In the Rock Island case the Court was considering the question of whether or not it should confirm the plan of reorganization which had been submitted to creditors and had been rejected by the vote of two of the classes of such creditors to whom such submission was made and the Court was faced with the question whether or not he should find that the rejection by these creditors was not reasonably justified. This question, of course, turned upon the particular facts applicable in that case. The important distinction is that the Court was there considering *confirmation* and not the reservation of jurisdiction after *confirmation*.

IV.

After Confirmation and Consummation, Rights Became Vested Which Could Not Be Disturbed by Congressional Action and the Court Was Right in Refusing to Attempt to Give Retroactive Effect to Hoped-for Legislation.

The plan in this case was not only confirmed without objection and without appeal but has been fully consummated, the old securities cancelled, the old mortgages released and the new securities delivered. Moreover, there has been trading in these securities over a period of many months. Certainly it cannot be said that the rights of those who have obtained the new securities are not vested.

It is elementary that legislation may not be enacted which has the effect of destroying or adversely affecting vested rights. Any such legislation by States is prohibited by the Fourteenth Amendment and similar legislation by Congress is a violation of the Fifth Amendment. This rule applies to property rights as well as rights acquired by contract, judgment or otherwise. Judge Cooley, in his

work on Constitutional Limitations, 8th Edition, Volume 1, pages 190, 191 and 192, states the general rule as follows:

> " 'But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the court.
>
> " 'As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law is, *or has been* is a judicial power; to declare what the law *shall be* is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial."
>
> " 'If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.' "

This rule as applied to judgments is found in *McCullough* v. *Virginia*, 172 U. S. 102. At page 123 the rule is thus stated:

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the

legislature to disturb the rights created thereby ceases."

One of the earliest cases establishing the rule is—

Steamship Company v. *Joliffe*, 2 Wallace 450, 457.

The Court in that case says:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The following statement is found in—

Pritchard v. *Norton*, 106 U. S. 124:

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim. 362-369."

See also—

Hoyt Metal Co. v. *Atwood*, 289 Fed. 453.
Coombes v. *Getz*, 285 U. S. 434.
Ocoha v. *Hernandez*, 230 U. S. 139.
Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1.

Applying the principle illustrated by these cases, it would seem to be clear that any legislation which Congress might enact which would take away anything from those who were entitled to participate under the plan and to

whom distribution has been made, or which would materially affect their rights, would violate the Fifth Amendment and would, therefore, be invalid as applied to this reorganization.

As a matter of fact, if the so-called Wheeler-Reed Bill had been enacted, we think it is perfectly clear that it would not by its terms apply to this proceeding. The property is no longer in the custody of the Court but has long since been transferred to the Reorganized Company, and the Court has no jurisdiction of the proceeding except for the very limited purpose set forth in the Final Decree which was entered on June 18, 1946, and is attached as Appendix A to the brief of the Reorganization Committee. Section 2 (15) of the proposed Bill was restricted to the case of a carrier under the jurisdiction of the United States Courts on the effective date of the Act. This obviously meant general jurisdiction and not the limited and restricted jurisdiction over procedural matters which was retained by the District Court. That view is supported by the following cases:

In re Corona Radio & Television Corp., 102 Fed. (2nd) 959 (C. C. A. 7—1939).

In re Wedgewood Hotel Company, 125 Fed. (2nd) 327 (C. C. A. 7—1942).

Whatever might have been the application of the statute is not for consideration here. The legislation was not enacted and at the moment none is pending. We are at a loss to understand the suggestion made by Petitioners that the District Court took hasty action in these proceedings when as a matter of fact the consummation of the plan of reorganization continued from the time of confirmation, in February, 1945, to December 1, 1945.

The Court has not, as suggested by Petitioners, stood in the way of any legislation or legislative action but has ap-

plied the law as it was and as it is. Petitioners, on the other hand, asked this Court to adopt a standby policy which would in effect suspend all reorganization plans in the hope that Congress might give them something to which they are not entitled under existing law. We believe we have pointed out that any such future legislation could not affect this proceeding, but in any case such a course would be a new departure in judicial procedure.

V.

There Is No Equity in the Position of Petitioners.

The question of whether or not the plan of reorganization was fair and equitable in this proceeding has been given full consideration and the plan, so far as the rights of the stockholders are concerned, has had the approval of this Court.

Group of Institutional Investors v. *C.M.St.P.&P. R.R.Co.*, 318 U. S. 523, 541.

At the hearing on the motion of Petitioners for a modification of the Consummation Order reliance was placed upon the general improvement in economic conditions and improved earnings of the carrier during the war period. The fact is, however, that the present plan was not approved by the District Court until June 30, 1944, and by that time the peak earnings, so far as net income was concerned of this carrier, had passed. At the time of the hearings before the Interstate Commerce Commission upon the final plan, the earnings for the year 1943 were introduced in evidence in Exhibits No. 224 and No. 231. There were appeals to the Circuit Court of Appeals from the order approving the plan and great reliance was placed upon the war time earnings. At the time of the argument on the appeal in the Circuit Court of Appeals, the earnings for the year 1943, and 1944 as well, were brought to the atten-

tion of the Court, and in dismissing the appeals, the Court said:

"We are of the view that the District Court properly refused to refer the proceeding to the Commission for the purpose of considering further a valuation theretofore determined and approved by the Supreme Court. Conceivably a situation might arise in a proceeding of this character wherein a party might be entitled to be heard on account of a changed condition, but in view of what the Supreme Court has said in this and other cases, we think clearly that no such situation is presented. Furthermore, the debtor seeks to circumvent the test of increased net earnings which the Supreme Court has prescribed and relies upon the alleged increased value of assets and the decreased amount of liabilities. In this connection, it is pertinent to observe that a memorandum taken from the record was handed to the court during oral argument, which discloses debtor's revenue and expenses for the years 1943 and 1944. While there was an increase in the amount of operating revenue in 1944 over the same period in 1943, there was a marked decrease in the net income for 1944, due to the greatly increased cost of operation. This situation is corroborative of the Supreme Court's prophetic discussion (pages 543-544 of 318 U. S.) as to what is likely to happen in a normal year."

* * * * *

"We are of the opinion that the appeals should be dismissed. In reaching this conclusion, we are not unmindful that parties are ordinarily entitled to have their cases reviewed on the merits. We are not presented, however, with an ordinary situation; in fact, it is extraordinary. The proceeding has been pending for more than nine years. As the Supreme Court in the instant case said (page 545 of 318 U. S.), 'We cannot conclude that in this proceeding, * * * the interests of junior claimants have been sacrificed for speed.' We are satisfied, as has so often been emphasized, that the public interest requires that there be no further delay. We think the motion to dismiss should be allowed on the

ground that the modified Plan conforms to the opinion and mandate of the Supreme Court, in which event there is nothing to review." *In Re C. M. St. P. & P. R. R. Co.*, 145 Fed. (2nd) 299, 304.

This Court said, with reference to war earnings (318 U. S. 543):

> "As we have noted, the Commission conceived as its responsibility the devising of a plan which would serve 'as a basis for the company's financial structure for the indefinite future.' We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future'."

It is clear, therefore, that any improvement in earnings during the war period was before the Commission and the Court for consideration before the plan was finally approved. The earnings record since confirmation has still further emphasized the correctness of the Commission's original conclusion. It will be noted that under the plan approximately $20,000,000 are required annually to service the plan through the preferred stock. The recent published report of this carrier covering the first six months of 1946 shows net income for that period, after deducting interest and other charges provided in the plan, as a deficit amounting to more than $3,500,000, and for the last two months of said period the earnings were not sufficient to pay operating costs. Exhibit 2 (R. 98) shows a reduction in total assets since the effective date of the plan. While it is true, as shown by the same exhibit, that on October 31, 1945, there were cash and temporary cash investments amounting to approximately $92,500,000, there were over against that item $46,635,916 of fixed interest in default and $142,031,902 of Adjustment Mortgage Bond interest unpaid and cumulative in character. If the plan were entirely set aside and the property turned back to the debtor under the old capitalization, it would immediately be the duty of the corporation

to pay out, as far as the cash items would go, these items of interest, and available current assets, as shown by the Exhibit, would fall far short of making the payments. In addition, the showing of current assets on October 31, 1945, did not take into consideration necessary expenditures which have since been made in order to service the plan from its effective date forward, namely: the payment of interest on fixed and income bonds since January 1, 1944, the effective date of the plan, and compliance with the provisions in the plan for capital funds and sinking funds. In addition, a dividend has been declared and paid on the new preferred stock, payable out of earnings for the year 1944, as authorized by the plan. This item required the expenditure of approximately $5,600,000. A like additional amount would be required if the full preferred dividend should be declared payable out of earnings for 1945. There are other items to be met out of current assets, and a reasonable amount for working capital must be available at all times, which amount is approximately $12,000,000. Such items were shown in Exhibit 231.

Before the Circuit Court of Appeals great reliance was also placed upon the cash which had accumulated during the war period while interest on the outstanding obligations was not being paid, and in support of their position Counsel confidently cited the case of—

Reconstructon Finance Corporation v. *D. & R. G. W. R. R. Co., et al.*, 150 Fed. (2nd) 28,

which had reversed decisions of the District Court approving and confirming the plan of reorganization for the carrier there involved. One of the grounds for the reversal was the accumulation of cash which the Circuit Court felt justified more liberal treatment of certain bondholders. Unfortunately for Petitioners' argument, however, that case was reviewed by this Court and reversed by the decision of June 10, 1946. (90 L. Ed. 1134.)

In discussing the matter of accumulated cash, this Court pointed out in the *Denver & Rio Grande decision, supra,* that the creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated which cash would be reflected in the value of the common stock, and that any gain or any loss after the effective date of the plan "was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them." So here, any cash available, not required to service the plan, would increase the value of the stock and, to the extent not required to maintain and operate the property, would properly go to the new stockholders who represent former bondholders who fell far short of receiving full compensation under the provisions of the plan.

Reference has already been made in the Statement of the Case to the fact that over $77,000,000 of bond interest was not compensated at all and secured claims in a total amount of $230,000,000 were compensated only to the extent of less than one-third. (R. 74.)

We mention these facts because the Petitioners apparently assume that the old preferred stockholders have been unjustly treated and that rights of some value have been forfeited, whereas exactly the contrary is the fact. The Commission was unable to find the wherewithal to fully compensate the bondholders and general creditors in this proceeding and subsequent events confirm rather than impeach the conclusion reached by the Commission and approved by the Courts that the stock was of no value.

Conclusion.

We feel that this petition is prosecuted by those who no longer have any interest in these proceedings and who heretofore have been precluded from participation by the order of confirmation; that they are attempting to review an order dismissing an appeal from an order which was not appealable and that there is no basis in law or in equity for granting their extraordinary request that the Bankruptcy Court be required to modify, with retroactive effect, and in utter disregard of vested rights acquired under a plan fully consummated, an order which has been completely carried out, for the sole reason that the Petitioners hope that at some future time they may secure the enactment of legislation, not now pending, which, if enacted, might in some way operate to their advantage.

We, therefore, respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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